IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3576 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KESHAVLAL DUNGARSHI MAVANI

Versus

STATE OF GUJARAT

Appearance:

MR HARIN P RAVAL for Petitioners

GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: /12/2000

C.A.V. JUDGEMENT

#. The prayer of the petitioners in this writ petition is for mandamus directing the respondents to restore the land of survey no.253, plot nos.11,27 and 30, total admeasuring 1,743.56 sq.meters, as well as, land of survey no.37 bearing plot nos.24 and 25 admeasuring

1,040.52 sq.meters and 148 sq.meters of land situated in Village Kotharia and Vavdi comprised within the urban agglomeration of City of Rajkot and has also sought declaration that they are entitled to hold and retain the aforesaid land.

#. The petitioner no.2 is the son of petitioner no.1. The petitioner no.1 on coming into force of Urban Land Ceiling Act, 1976, filled in form no.6(1) before the competent authority in the capacity of family. Description of family members was given in the aforesaid form. Nitinkumar Keshavlal, petitioner no.2 was born on 28-4-1956, hence, on coming into force of the Urban Land Ceiling Act, he was major who had attained the age of 19 years and 10 months approximately. Draft statement under sec.8(3) of the Act was issued by the competent authority on 24-3-1977. Written objections to the draft statement were filed on 18-4-1977. Written objections were rejected on 1-8-1978 without assigning any reason. Draft statement of 24th March, 1977 was taken as final statement under sec.9 of the Act. Feeling aggrieved, the petitioners filed appeal. The petitioner no.1 wanted to sell certain lands out of retainable lands permitted to be retained by the competent authority. Permission was sought under sec.26 of the Act. Permission could not be granted in view of pendency of the appeal, hence, the petitioner no.1 withdrew his pending appeal through application dated 15-3-1985. On 29-3-1985, permission to withdraw the appeal was granted and the appeal was withdrawn. On 13-11-1981, notification under sec.10(1) was issued by the competent authority, which was published in the Official Gazette on 26-11-1981. On 15-4-1982, notification under sec.10(3) was issued, which was published in the Gazette on 15-4-1982. Notice under sec.10(5) was issued on 16-6-1988, calling upon the petitioners to deliver possession of excess land. On 28-8-1990, proceedings were initiated under sec.11 for determination of compensation. Compensation was determined but, it was not withdrawn by the petitioners. In the year 1995, the petitioner no.1 preferred a second appeal before the Urban Land Tribunal under sec.33 alongwith an application for condonation of delay. The appeal was admitted and it was partly allowed on 16-5-1995. The order of the competent authority was set aside and directions were given to recalculate excess vacant land. The respondent filed a Special Civil Application No.1653/96, which was dismissed by this Court on 16-10-1998. Thereafter, the petitioner applied under sec.26 for permission on 29-1-1996 for sale of plot no.678 measuring 140 sq.meters and permission was granted on 29-1-1996. It is alleged that, inspite of stand of

the respondent that possession was taken, permission under sec.26 was granted in respect of plot no.67 measuring 148 sq.meters. After this permission, document of sale was executed on 1-2-1996. The grievance of the petitioner is that, after the order in second appeal, fresh draft statement under sec.8(3) was required to be issued and fresh order under sec.8(4) was required to be passed but, this was not done by the competent authority. Appeal was also filed by the petitioner no.1 claiming that, he being major son in the family on the relevant date, was entitled to hold one unit. The competent authority did not act in accordance with the directions given by the appellate authority. In the mean time, on 30-3-1999, the Urban Land Ceiling and Regulations (Repeal) Act, 1999 came into force, which was adopted by the State of Gujarat with effect from 30-3-1999.

#. On the above facts, the petitioners have sought for restoration of possession of land.

#. Two counter affidavits have been filed on behalf of the competent authority, respondent no.2, denying that the petitioners are entitled to restoration of possession of land whose possession was taken over by the State Government in accordance with law.

#. After hearing the arguments of Shri Raval and the learned AGP, the following points arise for consideration in this writ petition :-

1. What is the effect of Repeal Act on the pending appeal of the petitioner no.2 before the appellate authority.

2. What is the effect of Repeal Act consequent upon taking over possession of the excess land by the Government prior to enforcement of the Repeal Act.

3. Whether non-compliance of the order of the appellate authority in second appeal has rendered the whole proceedings incompetent and the petitioners are entitled to restoration of possession of land in question.

#. So far as the first point is concerned, it is not disputed that the appeal of the petitioner no.2 was pending before the appellate authority when the Repeal Act came into force. However, the plea which was raised by the petitioner no.2, in support of his claim for

holding one unit as one major member of the family, was not raised in the earlier appeal by the petitioner no.1, nor in the second appeal which was partly allowed. However, the claim of the petitioner no.2 can not be investigated by this Court now for the obvious reason that, in view of sec.4 of the Repeal Act, all proceedings under the principal Act pending immediately before the commencement of this Ordinance before any court, tribunal or any authority shall abate. As such, the appeal of the petitioner no.1, which was pending on the date of enforcement of the Repeal Act has abated. If this is so, then the appellate authority could not investigate the claim of the petitioner no.2 and there is no justification for this Court to investigate the claim of the petitioner no.2, which has abated under sec.4 of the Act.

#. Coming to the second point, the dispute has been raised, whether possession has been taken over by the Government or not ? On this point, the contention of Shri Raval has been that, taking over possession was only paper transaction. He has referred to the counter affidavit of Shri KD Kapadia, competent authority and also counter affidavit of Shri JK Astik, competent authority and pointed out that there are apparent contradiction in these counter affidavits regarding taking over possession. After carefully examining the two counter affidavits, I do not find any contradiction therein. It is clearly deposed in both these affidavits that possession was taken over on two dates, namely, 12-4-1984 and 28-5-1990. In para-3 of counter affidavit of Shri KD Kapadia, it is clearly deposed that possession of 1,040.52 sq.meters of land of Village Vavdi was taken over on 12-4-1984 and possession of land measuring 148 sq.meters of Village Nanamava was not taken on that day. It is further deposed in the concluding portion of para-3 that possession of 148 sq.meters of land of Village Nanamava was taken on 28-5-1990. There was no prohibition in taking possession on two different dates. It was not contended that possession was not in accordance with law. The contention that it was paper possession is not to be investigated in this writ petition. The disputed question of fact can not be entertained and decided in exercise of jurisdiction under Article-226 of the Constitution of India. It was never contended that possession was not taken by the competent authority or by the State Government or by any person duly authorized by the State Government. This is the only requirement of taking possession. It was also not argued that no panchnama was prepared or that possession was not taken over in presence of panchas. As against

this, para-3 of the counter affidavit of Shri JK Astik, competent authority shows that on both the dates, namely, on 12-4-1984 and 20-5-1990, possession was taken over in presence of panchas. Consequently, bare allegation that the recovery of possession was paper transaction can not be accepted for invalidating recovery of possession.

#. Shri Raval, however, has drawn my attention to the fact that, permission under sec.26 of the Act was sought in respect of 148 sq.meters of land, which was granted on 29-1-1996, and if, possession of this land was taken on 28-5-1990, permission to sell could not be granted on 29-1-1996. However, there is no invalidity in taking over possession of 2,752.08 sq.meters of land on 12-4-1984, as is mentioned in paragraphs no.2 and 3 of the counter affidavit of Shri KD Kapadia. Since, no rejoinder has been filed to the two counter affidavits, it has to be believed that possession of 2,784.08 sq.meters of land was taken over on 12-4-1984 and possession of 148 sq.meters of land of Village Nanamava was taken on 28-5-1990. If, possession of the vacant land was taken as deposed in the two counter affidavits, which are liable to be accepted, there remains no occasion to grant the relief of mandamus sought by the petitioners for restoration of land to them.

#. Coming to the third point, it was argued by Shri Raval that in the second round of appeal filed by the petitioner no.1, he became successful and the appeal was partly allowed and the order of the competent authority was set aside. Deduction to the extent of 180 sq.meters of flat in Bombay Jawahar Society was permitted by the appellate authority, which was treated as retainable land and the remaining 2,752.08 sq.meters land was directed to be declared surplus. It may be mentioned that the petitioner no.1 filed appeal on the first instance under sec.33 of the Act, which was, however, withdrawn on 29-3-1985. If the appeal was withdrawn at the first instance, then second appeal after expiry of limitation could not be filed, nor is there any provision for filing second appeal. However, second appeal was entertained and it was partly allowed on 16-5-1995. No doubt, Special Civil Application was filed by the State of Gujarat against this order, which was dismissed on 16-10-1998 vide Special Civil Application No.1653/96. Even, if it is accepted that the order dated 16-5-1995 stood confirmed after rejection of aforesaid Special Civil Application, it can safely be said that the entire appeal was not allowed. Only part of the appeal was allowed and part of the order of the competent authority was set aside, wherein deduction of 180 sq.meters land of

flat in Bombay Jawahar Society was permitted and rest of the land admeasuring 2,752.08 sq.meters was declared to be surplus land. It is, therefore, obvious from the order in second appeal that the entire order of the competent authority was not set aside and only partial modification was made in favour of the petitioner no.1. Merely because in the operative portion it is mentioned that the appeal is allowed and the order of the competent authority is set aside, it does not mean that the entire appeal was allowed and the entire order was set aside. On the other hand, proper order should have been that the appeal was partly allowed and the order of the competent authority was modified as indicated in the operative portion of the order in appeal passed on 16-5-1995. If it was a case of modification of order of the competent authority, no fresh draft statement under sec.8(3) was required to be prepared nor any fresh order under secs.8(4) and 9 was required to be passed by the competent authority. Thus, this inaction of the competent authority has not rendered declaration of surplus land as invalid or taking over possession of the surplus land as invalid.

##. In the second appeal decided on 16-5-1995 by the Tribunal, deduction of 180 sq.meters land of flat in Bombay Jawahar Society was granted. In para-2 of the counter affidavit of Shri KD Kapadia, it is clearly mentioned that competent authority had given permission under sec.26 to the petitioner on 29-1-1996 for the land measuring 148 sq.meters of plot no.67 of survey no.80 of Village Nanamava and, now the land holder is entitled for deduction of 32 sq.meters of this land only and the respondent is ready to restore to the petitioner this much land and no more. His stand is in accordance with the order passed in the second appeal.

##. In view of the above discussion, the petitioners are entitled to restoration of 32 sq.meters of land of plot no.67 of survey no.80 of Village Nanamava and no more.

##. The petition, therefore, partly succeeds and is partly allowed. The respondents are directed to restore possession of 32 sq.meters of land of plot no.67 of survey no.80 of Village Nanamava to the petitioners within a period of one month from today by delivering actual possession of the above area of land to the petitioners. Other reliefs are refused. No order as to costs.

Dated : /12/2000. [D.C. Srivastava, J.]

/sakkaf